

October 9, 2009

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United States Department of Commerce  
PATENT AND TRADEMARK OFFICE  
401 Dulaney Street  
Alexandria, VA 22313

Re: 10/594158

Dear Sir/Madam:

The enclosed document was received in our office on 10/05/09. We believe we have received this document in error.

If you have any questions or concerns regarding this matter, please feel free to contact our office at the above number.

Sincerley,

*M. Klausner*

MERCHANT & GOULD  
Prosecution Docket Department

Enclosure

Atlanta

Denver

Knoxville

Omaha

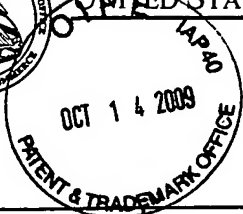
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# UNITED STATES PATENT AND TRADEMARK OFFICE



UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
|-----------------|-------------|----------------------|---------------------|------------------|

10/594,158

08/02/2007

Alan McLeod

175US1

2164

30328

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09/30/2009

NuVasive

c/o CPA Global

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Minneapolis, MN 55402

EXAMINER

BECCIA, CHRISTOPHER J

ART UNIT

PAPER NUMBER

3775

MAIL DATE

DELIVERY MODE

09/30/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



# Office Action Summary

## Application No.

10/594,158

## Applicant(s)

MCLEOD ET AL.

## Examiner

CHRISTOPHER BECCIA

## Art Unit

3775

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4 and 17-21 is/are rejected.
- 7) ☒ Claim(s) 5-16 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 26 September 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

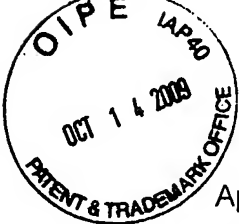
## Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 9/26/06.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_.



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## DETAILED ACTION

### *Claim Objections*

1. Claims 5-16 are objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim cannot depend from any other multiple dependent claim. See MPEP § 608.01(n). Accordingly, the claims have not been further treated on the merits.

### *Claim Rejections - 35 USC § 102*

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. **Claims 1, 2, and 17-21** are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Patent Pub. No. 2003/0078579 to *Ferree*.

As to **Claim 1**, *Ferree* discloses a fissure repair device (15), the device including a first portion (110 and 110'), a second portion (120 and 120') and a variable link (114) between the first portion and second portion, in which the first and second portions are portions of a common element ([0041 and 0042] describe integral device), one of the first or second portions being formed by one or both end portions of the element [0042] and (Fig. 4 shows 120 and 120' at end portion of element), the first portion being linked to the second portion by one or more link portions (link 114), the one or more link portions being portions of the common element [0042].

As to **Claim 2**, *Ferree* discloses a fissure repair device in which the first portion is formed by the intermediate portion of the element (See Fig. 2) and [0041] and the second portion is formed by the two end portions of the element (Fig. 4 and [0042]).

As to **Claim 17**, *Ferree* discloses a fissure repair device (15) including a first portion (110 and 110'), a second portion (120 and 120') and a variable link (114) between the first portion and second portion, in which the first and second portions are portions of a common element ([0041 and 0042] describe integral device), the first portion being linked to the second portion by one or more link portions (114), the one or more link portions being portions of the common element [0042], the second portion being formed by both end portions of the element [0042] and (Fig. 4 shows 120 and 120' at end portion of element).

As to **Claim 18**, *Ferree* discloses a fissure repair device in which the first portion (110 and 110') is in the forming of a first second portion (120) forming part, first link portion (114), first portion (110 and 110'), second link portion (108) and second portion forming part (120'), with this being the sequence from one end to the other of the element.

As to **Claim 19**, *Ferree* discloses a fissure repair device in which one of the second portion forming parts (120) and/or the link portion (140) connected to it, is provided with a reduced height part and/or neck part (neck part in [0042]) and the other of the second portion forming parts (120') and/or the link portion connected to it, is provided with an aperture (aperture through 108 surrounding 114).

As to **Claim 20**, *Ferree* discloses a fissure repair device in which the second portion forming part provided with the reduced height part and/or neck part is passed through the hole in the other second portion forming part [0042].

As to **Claim 21**, *Ferree* discloses a method of repairing a fissure in a material, the method including the steps of: providing a fissure repair device [0039], the device including a first portion (110 and 110'), a second portion (120 and 120') and a variable link (114); deploying the first portion of the device inside the fissure [0044]; deploying the second portion of the device outside the fissure (Fig. 7D); connecting the first portion to the second portion at one or more locations using the variable link [0042, 0044], the variable link passing through the material (See Fig. 2 and Fig. 7D).

***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. **Claims 3 and 4** are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Pub. No. 2003/0078579 to *Ferree* in view of U.S. Patent No. 7,341,601 to *Eisermann et al.*

As to **Claims 3 and 4**, *Ferree* discloses the claimed invention except wherein the first portion includes a first part, second part and third part, the first portion being provided with one or more holes in the second part thereof, the first portion being provided in the first and third parts thereof with one or more further sets of holes; and

the first part and/or third part are folded against the second part, the holes in the first and third parts align with holes in the second part.

*Eisermann* discloses a fissure repair device (30 in Fig. 6) wherein the first portion being provided with one or more holes in the second part thereof (holes within mesh of 30 and 35a and b), the first portion being provided in the first and third parts thereof with one or more further sets of holes (holes provide through portions of implant in Fig. 6); and the first part and/or third part are folded against the second part, the holes in the first and third parts align with holes in the second part (folding over in 30 in Fig. 6 would align 35a, b, and holes within mesh) in order to promotes tissue growth and repair of the annulus and stabilize the implant (Col. 2, lines 36-50).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the fissure repair device of *Ferree* with the holes of *Eisermann* and bone plate holder of *Grinberg* in order to promotes tissue growth and repair of the annulus and stabilize the implant.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CHRISTOPHER BECCIA whose telephone number is (571)270-7391. The examiner can normally be reached on M-F 7:30am - 5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas Barrett can be reached on 571-272-4746. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/CHRISTOPHER BECCIA/  
Examiner, Art Unit 3775

/Thomas C. Barrett/  
Supervisory Patent Examiner, Art  
Unit 3775





# **Notice of References Cited**

Application/Control No.

10/594,158

Applicant(s)/Patent Under  
Reexamination  
MCLEOD ET AL.

Examiner

CHRISTOPHER BECCIA

Art Unit

3775

Page 1 of 1

## **U.S. PATENT DOCUMENTS**

| * |   | Document Number<br>Country Code-Number-Kind Code | Date<br>MM-YYYY | Name               | Classification |
|---|---|--|-----------------|--------------------|----------------|
| * | A | US-2003/0074075 A1                               | 04-2003         | Thomas et al.      | 623/17.16      |
| * | B | US-2003/0078579 A1                               | 04-2003         | Ferree, Bret A.    | 606/53         |
| * | C | US-2004/0039392 A1                               | 02-2004         | Trieu, Hai H       | 606/86         |
| * | D | US-6,955,689 B2                                  | 10-2005         | Ryan et al.        | 623/2.36       |
| * | E | US-7,004,970 B2                                  | 02-2006         | Cauthen III et al. | 623/17.16      |
| * | F | US-7,341,601 B2                                  | 03-2008         | Eisermann et al.   | 623/17.11      |
| * | G | US-7,445,634 B2                                  | 11-2008         | Trieu, Hai H.      | 623/17.11      |
| * | H | US-7,588,574 B2                                  | 09-2009         | Assell et al.      | 606/86R        |
|   | I | US-  |                 |                    |                |
|   | J | US-  |                 |                    |                |
|   | K | US-  |                 |                    |                |
|   | L | US-  |                 |                    |                |
|   | M | US-  |                 |                    |                |

## **FOREIGN PATENT DOCUMENTS**

| * |   | Document Number<br>Country Code-Number-Kind Code | Date<br>MM-YYYY | Country | Name | Classification |
|---|---|--|-----------------|---------|------|----------------|
|   | N |  |                 |         |      |                |
|   | O |  |                 |         |      |                |
|   | P |  |                 |         |      |                |
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|   | R |  |                 |         |      |                |
|   | S |  |                 |         |      |                |
|   | T |  |                 |         |      |                |

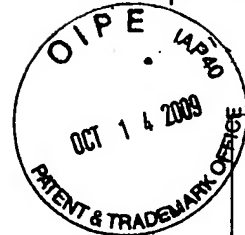
## **NON-PATENT DOCUMENTS**

| * |   | Include as applicable: Author, Title Date, Publisher, Edition or Volume, Pertinent Pages) |
|---|---|---|
|   | U |   |
|   | V |   |
|   | W |   |
|   | X |   |

\*A copy of this reference is not being furnished with this Office action. (See MPEP § 707.05(a).)  
Dates in MM-YYYY format are publication dates. Classifications may be US or foreign.

Receipt date: 09/26/2006

IAP16 Rec'd PCT/PTO 26 SEP 2006  
10594158 - GAU: 3775  
10/594158



Substitute for form 1449A/PTO

**INFORMATION DISCLOSURE STATEMENT BY APPLICANT**

(Use as many sheets as necessary)

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PTO/SB005(07-05)  
Approved for use through 7/31/2009, OMB 0551-0031  
US Patent & Trademark Office; U.S. DEPARTMENT OF COMMERCE

| Complete if Known    |                |
|----------------------|----------------|
| Application Number   | Unknown        |
| Filing Date          | March 24, 2005 |
| First Named Inventor | Alan McLeod    |
| Art Unit             | Unknown        |
| Examiner Name        | Unknown        |

Sheet 1 of 1 Attorney Docket No: 175US1

| US PATENT DOCUMENTS |         |                     |                  |   |                            |
|---------------------|---------|---------------------|------------------|---|----------------------------|
| Examiner Initial *  | Cite No | USP Document Number | Publication Date | Name of Patentee or Applicant of cited Document | Filing Date If Appropriate |
|                     |         | US-20030074075A1    | 04/17/2003       | Thomas, Jr., J. C.                              | 08/27/2002                 |
|                     |         | US-20030078579A1    | 04/24/2003       | Ferree, B. A., et al.                           | 10/03/2002                 |

| FOREIGN PATENT DOCUMENTS |                     |                  |   |                |
|--------------------------|---------------------|------------------|---|----------------|
| Examiner Initials*       | Foreign Document No | Publication Date | Name of Patentee or Applicant of cited Document | T <sup>2</sup> |
|                          | WO-0121246A1        | 03/29/2001       | Matsuura, D. G., et al.                         |                |
|                          | WO-04002374A1       | 01/08/2004       | Gainor, J., et al.                              |                |

| OTHER DOCUMENTS -- NON PATENT LITERATURE DOCUMENTS |                      |   |                |
|--|----------------------|---|----------------|
| Examiner Initials*                                 | Cite No <sup>1</sup> | Include name of the author (in CAPITAL LETTERS), title of the article (when appropriate), title of the item (book, magazine, journal, serial, symposium, catalog, etc.), date, page(s), volume-issue number(s), publisher, city and/or country where published. | T <sup>2</sup> |

EXAMINER

/Christopher Beccia/

DATE CONSIDERED

09/15/2009

Substitute Disclosure Statement Form (PTO-1449)  
\* EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609. Draw line through citation if not in conformance and not considered. Include copy of this form with next communication to applicant. Applicant's unique citation designation number (optional): Applicant is to place a check mark here if English language Translation is attached

ALL REFERENCES CONSIDERED EXCEPT WHERE LINED THROUGH. /C.B./